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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. ----------.

SOUTH SHORE PACKING CORPORATION,
Petitioner,

vs.

CITY OF VERMILION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, entered in this cause on February 15, 1967 denying a rehearing in this cause and affirming the judgment of the Sixth District Court of Appeals of Ohio, which in turn entered a judgment for the Defendant, the City of Vermilion, the Respondent herein.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the Court of Common Pleas is unreported and is printed in the Appendix, page 19. No opinion was rendered by the Court of Appeals or by the Supreme Court of Ohio.

JURISDICTION.

The judgment of the Supreme Court of the State of Ohio was entered on February 15, 1967 upon Petitioner's timely application. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3), since the rights, privileges and immunities under the United States Constitution and the Constitution of the State of Ohio and the Revised Code of the State of Ohio are claimed to have been violated.

QUESTIONS PRESENTED.

I. Does a municipal corporation have the right to take the real property of a private citizen for the alleged purpose of building a sewage plant thereon when the municipal corporation knew before they passed the Ordinance and Resolution and thereafter that the land of the Petitioner was not usable and would in fact never be used for such purpose or purposes?

II. Does the mere passage of a Resolution and Ordinance attempting to take the Petitioner's land for sewage purposes deprive the Petitioner from the right of defending the action of the municipal corporation upon the grounds that the Ordinance and Resolution which were passed were in fact untrue and that the said municipal corporation did not intend, and does not now intend, and cannot use the Petitioner's lands for sewage purposes?

III. Does the Constitution of the United States of America, to wit: Amendment V to the Constitution of the United States, Amendment XIV, Section I to the Constitution of the United States, Article I, Section 1 of the Constitution of the State of Ohio, Article I, Section 19 of the Constitution of the State of Ohio, and Article XVIII, Section 10 of the Constitution of the State of Ohio, forbid taking of private property of a citizen without due process, thereby depriving the Petitioner of the equal protection of the laws and due process?

IV. Are the courts of Ohio and the Supreme Court of the United States required to follow sections of the Revised Code of the State of Ohio now in force, to wit: Sections 163.01, 163.02 and 163.08, which sections hold that the taking of land by a municipal corporation is a judicial question as well as a legislative right?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States.

AMENDMENT V:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT XIV, Section I:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of Ohio.

Article I, Section 1:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

Article I, Section 19:

"Private property shall ever be held inviolate but subservient to the public welfare. * * * and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assesed by a jury, without deduction for benefits to any property of the owner."

Article XVIII, Section 10:

"A municipality appropriating or otherwise acquiring property for public use may in furtherance of such

public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. * * *"

Statutes.

R. C. 163.01:

"Definitions.

As used in sections 163.01 to 163.22, inclusive, of the Revised Code:

(A) "Public agency" means any governmental corporation, unit, organization, or officer authorized by law to appropriate property in the courts of this state. "Private agency" means any other corporation authorized by law to appropriate property in the courts of this state. "Agency" includes any public agency or private agency.

(B) "Court" includes the court of common pleas and the probate court of any county in which the property sought to be appropriated is located in whole or in part.

(C) "Owner" includes any individual, partnership, association, or corporation having any estate, title, or interest in any real property sought to be appropriated.

(D) "Real property," "land," or "property" includes any estate, title or interest in any real property which is authorized to be appropriated by the agency in question, unless the context otherwise requires."

R. C. 163.02:

"Applicability of chapter; exceptions.

All appropriations of real property, except as otherwise authorized by this section, shall be made

pursuant to sections 163.01 to 163.22, inclusive, of the Revised Code. The director of highways may appropriate any interest in real property pursuant to sections 163.01 to 163.22, inclusive, of the Revised Code or as otherwise provided by law.

Where so authorized by sections 6101.01 to 6101.84, inclusive, of the Revised Code, a conservancy district may appropriate real property by procedures prescribed in such sections.

Where so authorized by sections 6115.01 to 6115.79, inclusive, of the Revised Code, a sanitary district may appropriate real property by procedures prescribed in such sections."

R. C. 163.08:

"Answer by owner.

Any owner may file an answer to such petition. Such answer shall be verified as in a civil action and shall contain a general denial or specific denial of each material allegation not admitted. The agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifically denied in the answer and the facts relied upon in support of such denial are set forth therein, provided, when taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, an answer may not deny the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation. Any answer shall be filed on or before the third Saturday after the return day of the summons or service by publication as set forth in section 163.07 of the Revised Code. No extension of time for filing of an answer shall be granted."

STATEMENT.

The Respondent, the City of Vermilion, filed an action in the Court of Common Pleas of Erie County, Ohio, under Case No. 35245, to appropriate four (4) lots located on Water Street in Vermilion, Ohio, said lots having a width of two hundred forty (240) feet and an average depth of one hundred eighteen (118) feet. In accordance with the proper practice in the State of Ohio, the Petitioner, South Shore Packing Corporation, then filed an action against the Respondent, the City of Vermilion, to enjoin said City from appropriating such property, also in the Court of Common Pleas of Erie County, Ohio, and bearing Case No. 35481. In its Petition in the latter case the Petitioner fully set forth that the action of the City of Vermilion, as previously mentioned, was improper, capricious and contrary to the Constitution of the State of Ohio and of the United States, specifically mentioning that the lands of the Petitioner were not needed for a municipal sewage plant, and that the City would, in fact, never use such land for such purposes, even though the Resolution and Ordinance passed by the City specifically stated that the purpose of such Resolution and Ordinance was for the erection of a sewage system. Nevertheless, the taking of such lands would be contrary to the Constitution of the United States of America and the State of Ohio.

The Petitioner further advised the Respondent that its lands were at least twenty-five (25) feet higher than any of the lands in the valley area in which the sewage plant was to be located.

Eventually a trial was had before the Honorable LeRoy F. Kelly, sitting by assignment, in the Court of Common Pleas of Erie County, Ohio; that the Court finally gave judgment to the Respondent, the City of Vermilion, in which the Court said:

"The Court agrees with counsel for the Defendant that the taking of this said land will be for a public use and therefore, the only questions remaining at issue are whether or not the City abused its discretion or exercised bad faith or committed fraud in deciding to appropriate Plaintiff's land."

From this judgment the Petitioner appealed to the Sixth District Court of Appeals of Ohio filing the necessary briefs and memorandums required; that a hearing was had before the Court of Appeals, and they overruled the Petitioner's appeal and sustained the judgment of the Common Pleas Court. The verbiage of the Court of Appeals in its decision very closely resembled the verbiage of the Honorable LeRoy F. Kelly, to wit:

"Upon consideration of all of these items, and being fully advised in the matter, the court finds that the action of the defendant-appellee, City of Vermilion, to appropriate certain land owned by the plaintiff-appellant, South Shore Packing Corporation, for a municipal sewage disposal plant is authorized by law; that the appropriation proceedings are valid and were properly initiated by legislation of the City Council of said defendant-appellant, pursuant to such appropriation proceedings, is necessary for a public use and purpose; that the evidence does not show fraud, bad faith, collusion or an abuse of discretion on the part of said defendant-appellee."

From the decision of said Court of Appeals your Petitioner then filed a memorandum to the Supreme Court of Ohio in support of claimed jurisdiction of the Supreme Court on a motion to certify and of the right to appeal on constitutional questions. Petitioner in said Court submitted all of the facts of the case as well as the law indicated herein; that the Supreme Court of Ohio refused

to take jurisdiction in the matter and on a motion for rehearing again refused to take jurisdiction.

A reading of the decisions of the courts below indicates that both the Court of Common Pleas and the Court of Appeals took as a matter of law the proposition that the mere passing of a resolution and ordinance by a municipal corporation was the only step required by such corporation to take such real property, and that there was no defense of any kind allowable except that of fraud or bad faith.

The Honorable Judges totally disregarded decisions of this Court and the decisions of the courts of the State of Ohio on the same subject, and also disregarded the law of Ohio as contained in the Revised Code Sections 163.01, 163.02 and 163.08, which very clearly indicated that a judicial question existed and not a mere question as to whether or not an ordinance and resolution were passed to appropriate lands. It is therefore totally apparent that in entering their judgments against the Petitioner the Courts totally disregarded all the applicable sections of the Constitution of the United States and of the State of Ohio as mentioned herein, and also totally disregarded the applicable provisions of the Ohio Revised Code, to wit: Sections 163.01, 163.02 and 163.08.

The trial in the Common Pleas Court disclosed evidence that the City Engineer was a full partner to a company known as R. E. Warner and Associates, with whom the City contracted to do the sewage engineering work. It also showed that a number of members of City Council and the well-to-do people of Vermilion, Ohio and vicinity lived in a little island southeast of the City called the Lagoons, which was crossed by a bridge, and that the current sewage plant now existing was located on this little island; that the area, having become very desirable

for dwelling houses, the city officials, including Mr. Warner of R. E. Warner and Associates, the engineers, decided to place it elsewhere since the system was not efficient and was causing malodor, so that the primary purpose of creating a new sewage plant was getting the plant away from the Lagoons and into an area not built up. The Resolution and Ordinance were therefore not for a public purpose at all, but for the private benefit of the residents of the Lagoons and against the public interest at large.

The passage of the Resolution and Ordinance was done without notice to the people of the City of Vermilion or to the Petitioner. Both the Resolution and Ordinance were passed as emergency measures without argument and without discussion.

REASONS FOR GRANTING THE WRIT.

The proposed taking of the Petitioner's land is contrary to the laws of the State of Ohio, especially Sections 163.01, 163.02 and 163.08. The Resolution and Ordinance under which it was passed were illegal and improper inasmuch as councilmen who testified at the hearing stated they didn't know anything about the proposed sewage improvement plan except as they had been advised by Mr. Ochse, the City Engineer, whom the Court will remember is a partner of R. E. Warner and Associates; that they accepted Mr. Ochse's statements without challenge or debate.

Petitioner points out that it is illegal and indecent for a City Engineer, whose word is taken absolutely as to a city's needs, to hire his own firm to authorize a million dollars worth of sewage improvements and to pick out what lands should be used for such purpose and to place

such sewage plant in such a manner as will increase the value of the dwelling houses in which Mr. Warner lived as well as some other members of Council. It is specifically pointed out that none of the Judges below from the Court of Common Pleas to the Supreme Court of Ohio considered the proposition that the appropriation of land in Ohio is a judicial question. None of the Judges took stock in any of the evidence indicating that there was an absolute lack of necessity for taking such land, and that no deliberations were had in attempting to take such land or in passing the Resolution and Ordinance. The Court will read the testimony by the President of City Council on page 47 of the Record of the testimony in which he states:

> "Q. And based upon your own independent knowledge, if you have any on this subject, and disregarding anything Mr. Ochse or R. E Warner and Associates may have told you, or other members of council, isn't it a fact that you do not know whether or not the city of Vermilion must have these four lots of the plaintiff to build its sewage plant? * * *
>
> A. Being—again, not being an engineer I cannot say. I have to more or less rely on an expert in this position and I feel that if the engineering drawings and the necessary plans show that we need it and I feel that my own independent thinking is that we would need it."

Petitioner submits that the testimony of Cornelius G. Maloney, which appears in the Record, is a graduate Civil Engineer and who testified that he made a study of the area in question. Some of his testimony appears at pages 9, 12, 19 and 20 of his deposition, which reads as follows:

Page 9:

> "Q. My question related to this report (Plaintiff's Exhibit 1) as it exists. Was this report as it exists sufficient in scope from an engineering point of view

to advise the city as to what type of plant it ought to have and where it ought to be?

A. My answer to that would be definitely no.

Q. The reasons for that, Mr. Maloney?

A. You are asking me?

Q. Yes.

A. Well, many principles of engineering are not determined at this point. There is a great deal of additional engineering research that should be done before a conclusive report is handed to the city, upon which the city is going to predicate the entire program."

Page 12:

"Q. If the City of Vermilion, Mr. Maloney, used Plaintiff's Exhibit 1 as their authority for deciding to erect a sewage plant in the place where it is proposed to be used, in your opinion would the city have had sufficient information to base its decision?

A. I would answer that no. Because, I replied earlier, that this is a preliminary study, and this study should lead to a further engineering study. This should have been given purely as a preliminary report."

Page 19:

"Q. Now, if you will, look at this map, would you please, and tell us whether any portion of the Plaintiff's lots would be included in the needs for the plant desired by the City of Vermilion? * * *

A. Your question to me, if I recall, was did anything planned here touch their lots. The answer is no. According to the scale of this map.

Q. I will ask you the same question exactly to the second increment Circa 1974, marked B.

A. The same answer."

Page 20:

"Q. I will ask the same question as to the alternate second increment, Circa 1974, marked C.

A. The same answer.

Q. I will ask you the same question as to the third increment, Circa 1990, marked D.

A. The same answer applies to that.

Q. Now, with reference to all these questions and all these answers, isn't it a fact that the City of Vermilion in that particular study has pushed its program up to at least 1990?

A. This program is laid out to 1990, yes.

Q. And nowhere in that program—I will ask you —is there anywhere in that program that the Plaintiff's lands are included in the proposed needs of the City of Vermilion, is that correct?

A. I don't know what you mean by proposed needs. If you mean construction facilities on the property, the answer to that is it does not indicate that they need the property for any construction, no."

Statement of Law.

The Petitioner herein relies upon the case of *Cincinnati v. Vester* as decided by the Sixth Circuit Court of Appeals, 33 Fed. 2d 242, 68 ALR 831, affirmed by the United States Supreme Court, 281 U. S. 439, 74 L. Ed. 950, 50 Supreme Court 360, and upon the case of *City of East Cleveland v. Nau* decided by the Ohio Supreme Court in 1931, 124 Ohio St. 433, 179 Northeastern 187.

In the case of *Cincinnati v. Vester,* the City of Cincinnati had passed an ordinance to appropriate a 25 foot strip for the purpose of widening Fifth Street and in addition, undertook to appropriate areas adjacent to this strip. The sole question for decision was whether the additional property was to be devoted to a public or a private use. *As we have set forth previously, there is no showing that the property in the case at bar will be used for any public use within the foreseeable future.*

The appropriation ordinance in the *Vester* case was passed pursuant to Article XVIII, Section 10 of the Constitution of Ohio authorizing "excess condemnation," which is the taking by eminent domain of more property than is necessary for a public improvement and subsequently selling or leasing the surplus. The City based its claim upon three theories: the first, that the balance of the property not taken would be valueless; the second, that the City needed to sell the adjacent land under restrictions to preserve the beauty and usability of the street; and third, that the City could sell property not needed and thereby recoup part of the cost. The Circuit Court of Appeals in the opinion says at page 835:

> "It is to be admitted that, under our present methods of living, public necessity requires that the citizen be deprived of much of the freedom of the use of his property that formerly seemed to inhere in its ownership. In dealing with this enlarged public interest the courts, nevertheless, have not departed from established principles, but have only applied them to new conditions; and it is the law now, as it always has been, that the due process clause of the Constitution applies to the state and all of its agencies. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581; City R. Co. v. Citizens' Street R. Co., 166 U. S. 557, 41 L. Ed. 1114, 17 Sup. Ct. Rep. 653. It is equally well settled that condemnation for a non-public use is a denial of due process of law (Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 49 L. Ed. 462, 25 Sup. Ct. Rep. 251), and that whether the use is public or private is a judicial question (Hairston v. Danville & W. R. Co., 208 U. S. 598, 52 L. Ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008)."

* * * * *

"We do not say that the City of Cincinnati might not in a proper case take land adjacent to one of its public streets for a lateral support or to preserve the street as such. Neither do we decide that there may not be cases where the remnant would be so small as compared to what was actually needed and taken that what was needed might not be regarded, in view of what was left, as the equivalent of the entire tract, and thus the entire tract be taken. We consider only these cases before us; and what we decide is that the proposed use is not a public use within the meaning of that term, as it heretofore has been held to justify the taking of private property. The provision of the Constitution is that the municipality in acquiring property for public use 'may, in furtherance of such public use,' appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as 'shall be appropriate to preserve the improvement made.' This would seem to mean in furtherance of the normal use to which the property that is occupied by the improvement is devoted—here the use and preservation of the street for the purposes of travel. If it means, as the city here contends, that property may be taken for the purpose of selling it at a profit and paying for the improvement, it is clearly invalid."

This case was affirmed by the Supreme Court in 1929 in the case of *Cincinnati v. Vester*, 281 U. S. 439. In the opinion at page 955 (L. Ed.), the Supreme Court says:

"It is well established that in considering the application of the 14th Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.

* * * * *

"Under the provision of the Constitution of Ohio for excess condemnation when a city acquires property for public use, it would seem to be clear that a mere

statement by the council that the excess condemnation is in furtherance of such use would not be conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital. This would be to treat the constitutional provision as giving such a sweeping authority to municipalities as to make nugatory the express condition upon which the authority is granted."

* * * * *

"The general declaration of the resolution of the city council, and of the ordinance if that may be read with the resolution, for the excess condemnation in the present case, is plainly not a definition."

Following the *Vester* case, in the case of *City of East Cleveland v. Nau,* 124 Ohio St. 433, 179 Northeastern 187, the Court says in the opinion at page 436:

"The city and property owner both cite the case of City of Cincinnati v. Vester, 281 U. S. 439, 50 Sup. Ct. 360, 74 L. Ed. 950. The City contends that its proceedings were in accord with the rule there enunciated. This the property owner denies. That case is authority for the principle that under Section 10, Article XVIII of our State Constitution, municipal legislation failing to define the purpose of excess appropriations in definite and specific terms cannot be sustained, and that in applying the 14th Amendment of the federal Constitution to cases of excess appropriation of private property the question, What is a public use? is a judicial one. It follows *a fortiori* that the city is required not only to define specifically the purpose of the appropriation in its legislation, but it is incumbent upon the city to sustain such requirement by proof of its necessity, since the power granted to a municipality to appropriate excess property in furtherance of a public use is only granted when the excess is reasonably needed for that use."

Neither of said cases have been overruled, reversed nor modified.

In 1965 the State Legislature adopted a new chapter on eminent domain, particularly Sections 163.01, 163.02 and 163.08. The right of a property owner to answer specifically granted by Section 163.08 is a legislative recognition that the question of necessity is a judicial and not exclusively a legislative question.

The case of *Senn v. Tile Layers Protective Union, Local No. 5*, Wis. 1937, 57 S. Ct. 857, 301 U. S. 468, 81 L. Ed. 1229 is referred to in 28 U. S. C. A. § 1257, Note 192 at page 240, where it is said:

> "Where it appeared that provisions of Wisconsin Labor Code were relied on, that their validity under U. S. C. A. Const. Amend. 14 was duly challenged below and that rulings of state courts were based ultimately on the Labor Code and where federal Supreme Court had never expressly passed on question whether the Labor Code as construed and applied violated said amendment, motion to dismiss appeal from judgment of state court upholding the Labor Code for want of jurisdiction was denied."

The case of *Western Turf Ass'n v. Greenbert*, Cal. 1907, 27 S. Ct. 384, 204 U. S. 359, 51 L. Ed. 520 is referred to in 28 U. S. C. A. § 1257, Note 198 at page 248, where it is said:

> "The judgment of the highest court of a state, sustaining, as a legitimate exertion of the police power of the state, a statute, the validity of which was challenged as repugnant to the Federal Constitution, is reviewable in the federal Supreme Court by a writ of error."

The case of *Turner v. State of La.*, La. 1965, 85 S. Ct. 546, 379 U. S. 466, 13 L. Ed. 2d 424 is referred to in 28 U. S. C. A. § 1257, Note 330 at page 292, where it is said:

"Certiorari by Supreme Court was granted to consider claim that circumstances attending state trial were such as to deprive defendant of rights secured to him by U. S. C. A. Const. Amend. 14."

The case of *Louisiana Power & Light Co. v. City of Thibodaux*, La. 1959, 79 S. Ct. 1070, 360 U. S. 25, 3 L. Ed. 2d 1058, rehearing denied 79 S. Ct. 1442, 360 U. S. 940, 3 L. Ed. 2d 1552 is referred to in 28 U. S. C. A. § 1257, Note 331 at page 293, where it is said:

"Importance of question in judicial enforcement of power of eminent domain under diversity jurisdiction impelled Supreme Court to grant certiorari in condemnation case in which District Court had applied doctrine of absention."

The case of *Allegheny County v. Frank Mashuda Co.*, Pa. 1959, 79 S. Ct. 1060, 360 U. S. 185, 3 L. Ed. 2d 1163, rehearing denied 80 S. Ct. 41, 361 U. S. 855, 4 L. Ed 2d 93 is referred to in 28 U. S. C. A. § 1257, Note 331 at page 293, where it is said:

"Important question presented, as to whether District Court had discretion to abstain from exercise of diversity jurisdiction in circumstances of suit challenging validity of expropriation, impelled Supreme Court to grant certiorari."

Statement of Reasons Why Said Cause Is of Public or Great General Interest and Statement of Constitutional Grounds and Why Writ of Certiorari Should Be Granted.

1. It is a matter of public or great general interest to every property owner and municipality in Ohio to determine whether or not a mere arbitrary legislative enactment declaring it necessary to take property for a public use without proof of necessity and without proof that the

property proposed to be taken will be used for public use within the foreseeable future is determinative of the rights of the parties and deprives the courts of jurisdiction to determine whether or not the taking will be for public use.

2. It is important to determine whether or not Article I, Section 1, and Article I, Section 19 of the Constitution of the State of Ohio and Amendments V and XIV, Section I, to the Constitution of the United States protect the property owner against a legislative determination as to the necessity of taking and as to whether or not the property taken is for public use.

3. It is also important to determine whether or not a municipal corporation may proceed with "excess condemnation" under the terms of Article XVIII, Section 10 of the Constitution of the State of Ohio without defining specifically the purpose of the appropriation as required by the cases above cited.

4. It is also important to determine whether or not Sections 163.02 and 163.08 of the Revised Code are applicable in the above case inasmuch as Section 163.08, effective January 1, 1966, recognizes that the question of the necessity for the taking is a judicial question.

CONCLUSION.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN B. OTERO,
WILLIAM M. BARRETT and
OLIVER TRUE,
Counsel for Petitioner.

APPENDIX.

OPINION OF THE COURT OF COMMON PLEAS, ERIE COUNTY.

(October 26, 1965.)

Plaintiff, South Shore Packing Corporation, has filed an action requesting that the City of Vermilion be enjoined from appropriating certain land owned by the Plaintiff.

The City is seeking in a separate suit to appropriate certain land owned by Plaintiff and alleges that it intends to use the same for a new municipal sewage disposal plant.

The Court agrees with counsel for the Defendant that the taking of this said land will be for a public use and, therefore, the only questions remaining at issue are whether or not the City abused its discretion or exercised bad faith or committed fraud in deciding to appropriate Plaintiff's land.

The evidence presented in this case does not show that any fraud, bad faith, collusion or abuse of discretion was practiced or committed by the Defendant, City of Vermilion.

Therefore, it is ordered, adjudged and decreed that the temporary injunction heretofore issued be vacated and held for naught and the case is hereby dismissed at Plaintiff's costs. Counsel for Defendant may prepare the appropriate Journal Entry.

See Journal.

(S) L. F. KELLY,
Judge.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, ERIE COUNTY.

(October 28, 1965.)

On September 20, 1965, this case was heard on the petition of the plaintiff, The South Shore Packing Corporation, the answer of the defendant, The City of Vermilion, the evidence and the arguments and the briefs of the counsels. The defendant, The State of Ohio, is in default of answer or other pleading.

Upon consideration of the pleadings, the evidence, the briefs and the arguments, and being fully advised in the matter, the court finds that the appropriation by the defendant, The City of Vermilion, of the real estate is for a public use. The court further finds that the Defendant, The City of Vermilion, has not been guilty of any fraud, bad faith, collusion or abuse of discretion in the appropriation.

Therefore the court denies the permanent injunction prayed for in the petition, vacates the temporary injunction previously granted herein, and dismisses the case at the costs of the plaintiff.

Exceptions are granted to the plaintiff.

(S) LEROY F. KELLY,
Judge.

APPROVED:

(S) WILLIAM M. BARRETT,
Attorney for Plaintiff.

(S) DAVID C. GEORGE,
Attorney for Defendant, The City of Vermilion, Ohio.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, ERIE COUNTY.

(November 24, 1965.)

On oral motion of plaintiff the motion for a new trial is hereby amended by interlineation by adding after the paragraph marked "2," the following, to wit: 2a. That the judgment is contrary to the Constitution of the United States of America, to wit: the 14th Amendment thereof.

2b. That the judgment is contrary to the Constitution of the State of Ohio, to wit: the sections 1 and 19 of Article 1 of the Constitution of the State of Ohio.

(S) LEROY F. KELLY,
Judge.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, ERIE COUNTY.

(December 13, 1965.)

After due consideration, the Court hereby overrules plaintiff's motion for a new trial.

Exceptions.

(S) LEROY F. KELLY,
Judge.

DOCKET ENTRY OF THE COURT OF APPEALS, ERIE COUNTY.

(June 16, 1966.)

To: The Clerk of Courts:

Please make the following entry upon our docket in the above-entitled case as of the date of receipt hereof, or as of the date indicated below:

"Motion of appellee to dismiss appeal overruled. Motion of appellant for extension of time within which to file brief granted, and appellant given leave to file said brief on or before June 27, 1966, and appellee granted leave to file answer brief on or before July 11, 1966. Case assigned for oral argument on merits on Friday, July 15, 1966, at 10:00 o'clock, A.M., Court House, Toledo, Ohio." (Clerk of Courts to journalize this entry)

As soon as appellee's brief has been filed, will you please forward the entire file to me here at Toledo. I am enclosing herewith motion prepared by appellants, which please file as of June 16, 1966. Am also returning to you enclosed one copy of appellee's motion to dismiss appeal and brief in support thereof for return to the file.

(S) RAY L. WHITAKER,
Administrative Assistant,
Sixth District Court of Appeals
Court House,
Toledo, Ohio.

JOURNAL ENTRY OF THE COURT OF APPEALS, ERIE COUNTY.

(September 7, 1966.)

On July 15, 1966, this cause was heard as an appeal on questions of law and fact from a decision of the Common Pleas Court for Erie County. The case was heard by this court on the pleadings, the record from the Common Pleas Court, the deposition of Cornelius G. Maloney, a witness, and the briefs and arguments of counsel.

Upon consideration of all of these items, and being fully advised in the matter, the court finds that the action of the defendant-appellee, City of Vermilion, to appropriate certain land owned by the plaintiff-appellant, South Shore Packing Corporation, for a municipal sewage disposal plant is authorized by law; that the appropriation proceedings are valid and were properly initiated by legislation of the City Council of said Defendant-Appellant, pursuant to such appropriation proceedings, is necessary for a public use and purpose; that the evidence does not show fraud, bad faith, collusion or an abuse of discretion on the part of said defendant-appellee.

The court further finds that the introduction into evidence of the deposition of the witness, Cornelius G. Maloney, was proper; and the objection to the introduction of the deposition into evidence is overruled.

Wherefore the court denies the injunction prayed for in the petition of the plaintiff, the petition is dismissed at the costs of the plaintiff-appellant, and this case is

remanded to the Common Pleas Court for Erie County for execution for costs in that court and in this court.

(S) DUDLEY F. SMITH
Judge.

APPROVED:

(S) WILLIAM M. BARRETT
Attorney for Plaintiff-Appellant

(S) OLIVER TRUE
Attorney for Plaintiff-Appellant

(S) DAVID GEORGE
Attorney for Defendant-Appellee, City of Vermilion.

JOURNAL ENTRY OF THE SUPREME COURT OF THE STATE OF OHIO.

(January 11, 1967.)

This cause, here on appeal as of right from the Court of Appeals for Erie County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Erie County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

(S) THOMAS L. STARTZMAN
Clerk

JOURNAL ENTRY OF THE SUPREME COURT OF THE STATE OF OHIO.

(January 11, 1967.)

Motion for an order directing the Court of Appeals for Erie County to certify its record.

"It is ordered by the Court that this motion is overruled."

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

(S) THOMAS L. STARTZMAN
Clerk

JOURNAL ENTRY OF THE SUPREME COURT OF THE STATE OF OHIO.

(February 15, 1967.)

It is ordered by the court that rehearing in this case is denied.

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 100.

(S) THOMAS L. STARTZMAN
Clerk

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JUN 7 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1366~~ 139

SOUTH SHORE PACKING CORPORATION,
Petitioner,

vs.

CITY OF VERMILION,
Respondent.

BRIEF OF THE RESPONDENT, CITY OF VERMILION, IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI.

DAVID C. GEORGE,
100 East Broad Street,
Elyria, Ohio 44035,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO — TEL. (216) 621-0647

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1366.

SOUTH SHORE PACKING CORPORATION,

Petitioner,

vs.

CITY OF VERMILION,

Respondent.

BRIEF OF THE RESPONDENT, CITY OF VERMILION, IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

We shall restate the facts of this case in order to clarify the Statement of the Case in the Petition for a Writ of Certiorari.

The Respondent, City of Vermilion, Ohio, a Charter city under the Ohio Constitution, decided several years ago that a new sewage disposal plant and a revised sanitary sewer system were needed by the city. The existing facilities were old, outmoded, and being operated under a special permit from the Ohio State Department of Health.

In 1961 the city hired R. E. Warner and Associates, an engineering firm, to prepare a comprehensive plan for such a plant and system. This plan was prepared and presented to the City Council in 1962.

After studying the plan the City Council began to take the steps necessary to implement it. Portions of the sewer lines prescribed in the plan have been constructed. Addi-

tional sewer lines are now in the construction and engineering phases.

The largest single project in the plan is the construction of a new sewage disposal plant on a new central site in the city. This new plant will replace three small facilities now in use. In 1964 the city began to purchase the land for the site of the new plant. The city purchased, at private sale, four of the five parcels needed for the site. The petitioner, South Shore Packing Corporation, refused to sell its land. The city followed the procedure prescribed by the Ohio Revised Code to appropriate the petitioner's land. On February 19, 1965, the city filed its legal action in the Common Pleas Court for Erie County, Ohio, to appropriate the land.

On July 21, 1965, the Petitioner filed an action, in the same court, to enjoin the appropriation. At a trial on September 20, 1965, an injunction was denied. Petitioner then appealed to the Sixth District Court of Appeals of Ohio. This court retried the case on July 15, 1966, and denied the injunction. Petitioner then filed an appeal in the Ohio Supreme Court asking for a Motion to Certify the Record and a Right to Appeal on Constitutional Grounds. The court declined to hear the case, and rejected the Petitioner's Motion for a Rehearing. The opinions and decrees of the various courts are correctly set forth in the Petitioner's Petition for a Writ of Certiorari.

In 1965 the Ohio General Assembly enacted a new Chapter to the Ohio Revised Code. This Chapter, Chapter 163, provides a new method for the condemnation and appropriation of real estate. Although adopted in 1965, this Chapter did not go into effect until January 1, 1966, more than ten months after the Respondent's appropriation case was filed and more than three months after the Petitioner's injunction was denied by the Common Pleas Court.

STATEMENT OF THE LAW.

Throughout its entire case the Petitioner has confused two terms that are commonly used in appropriation cases. These terms are "use" and "amount." "Use" is the purpose for which the land is being taken. "Amount" is the geographical extent of the land being taken. Once it is determined that land is being taken for a public "use" then the "amount" of land that is being taken is a legislative question and is not subject to judicial review in the absence of fraud, collusion, bad faith or an abuse of discretion by the appropriating agency.

There is no question that taking land as the site of a sewage disposal plant is taking it for a public use. Such an appropriation is specifically authorized by Section 719.01(J) of the Ohio Revised Code.

In our present case both of the courts that tried the case on its merits determined in their Journal Entries that the land was being taken for a public use, and that there was no evidence of any fraud, bad faith, collusion or an abuse of discretion on the part of the Respondent.

Once this is determined then the amount of the taking is a legislative question, and it is not subject to judicial review.

A very early Ohio case on this is *Iron Railway Company vs. Ironton (City)*, 19 Ohio State 300. In this case the property owner tried to enjoin the city from appropriating certain land. The owner claimed that the land was not needed for a new wharf. The Ohio Supreme Court rejected this contention. The Court said in Syllabus one of its decision:

> "Under the statute authorizing the appropriation of private property for a public wharf by a municipal corporation, the discretion of determining the quantity of ground required for such purpose is vested in

the corporation; and where, in making the appropriation, this discretion has been exercised by the municipal authorities in good faith, their action is final."

The land mark case in the United States on this matter is *Shoemaker vs. United States,* 147 U. S. 282, 13 Supreme Court 361, 37 Lawyers Edition 170. In this case the United States appropriated certain land in Washington, D. C. for use as a public park called Rock Creek Park. The land owner attempted to enjoin the appropriation on the basis that the land was valuable to him and not needed for the park. The United States Supreme Court, in a lengthy opinion, dismissed the landowner's case. The Court said at page 390 of 13 Supreme Court:

"The adjudicated cases likewise establish the proposition that, while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted: that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation be made."

The case of *United States of America vs. Agee,* 322 Federal Reporter, Second Series, 139, is similar to our own case. The United States condemned 57 acres as part of a reservoir behind a dam. Only 24 acres would be flooded. The remainder was above the high water mark and would never be flooded. The land owner attempted to enjoin the taking of the remainder (33 acres) on the basis that this land was not required for the project. The Sixth Circuit Court of Appeals dismissed the owner's case. The court said:

"It is well established that the federal government, in eminent domain proceedings, is not limited to

precisely the amount of property which will be physically occupied by the public. Thus, for example, in the construction of a dam and reservoir, as in the instant case, the Government is not restricted to taking the land which will be actually submerged if the additional land can be reasonably related to a public purpose."

In *United States vs. Certain Real Estate, etc.*, 217 Federal Reporter, Second Series 920, the United States appropriated certain land for use as a portion of the site for a new federal office building. The new building in no way covered or even touched the land in question. No governmental agency had any plans for the use or development of the land in question. The land owner tried to enjoin the appropriation. The Sixth Circuit Court of Appeals dismissed the case. The court said at page 924:

"The quantity of property needed and whether the taking of a particular piece of property is necessary are not subject to inquiry by the courts."

Another recent decision is *Berman vs. Parker*, 75 Supreme Court 98, 348 U. S. 26, 99 Lawyers Edition 27. The City of Washington, D. C. appropriated certain real estate for an urban renewal project. The property owner tried to enjoin the appropriation claiming that his land was not needed. The court said at page 104 of 75 Supreme Court:

"It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. * * * It is not for the courts to determine whether it

is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the court to sort and choose among the various parcels selected for condemnation.

The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."

In its brief the Petitioner relies on the case of *Cincinnati vs. Vester,* 281 U. S. 439, 50 Supreme Court 360, 74 Lawyers Edition 950. This case concerns the appropriation of land to widen a city street. In its legislation, for the appropriation, the city failed to state the reason why the land was being taken. The legislation said only that the land was being taken, "in furtherance of the public use." There was no statement defining what was the use. This was not in compliance with the Ohio statute prescribing the procedure for appropriation.

The U. S. Supreme Court decided that the city did not follow the statutory procedure for appropriation. Therefore the attempted taking was invalid. At page 363 of 50 Supreme Court the court said:

"It is an established principle governing the exercise of the jurisdiction of this Court that it will not decide important constitutional questions unnecessarily or hypothetically. The present cases call for the application of this principle. Questions relating to the constitutional validity of an excess condemnation should not be determined upon conjecture as to the contemplated purpose, the object of the excess appropriation not being set forth as required by the local law.

We conclude that the proceedings for excess condemnation of the properties involved in these suits were not taken in conformity with the applicable law

of the state, and in affirming the decrees below upon this ground we refrain from expressing an opinion upon the other questions that have been argued."

The case of *City of East Cleveland vs. Nau,* 124 Ohio State 433, 179 Northeastern 187, cited by the Petitioner, is also a case in which the appropriating agency failed to state correctly the purpose for which the land was being taken. Land was appropriated for a street widening. Actually, as shown by the testimony of the City Engineer, the land was to be taken and used for a park strip. The court ruled that since the purpose of the taking was not correctly stated the attempted appropriation was invalid.

The Petitioner has attempted to apply certain sections of Chapter 163 of the Ohio Revised Code to this case. This Code Chapter is new legislation. It became effective more than ten months after the Respondent's action for appropriation was filed and more than three months after the Common Pleas Court tried this injunction action. To apply this new Code Chapter to existing litigation would give the statutes a retroactive effect. This is prohibited by Article II, Section 28 of the Ohio Constitution and Section 1.20 of the Ohio Revised Code.

CONCLUSION.

We submit to the court that the Petitioner's case does not show any question of great general interest since the law on the subject was decided many years ago. Courts have followed this law ever since. Petitioner has failed to show any constitutional issues in its petition. Therefore the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID C. GEORGE,
Counsel for Respondent.

APPENDIX.

Ohio Constitution Article II, Section 28.

Section 28 Retroactive Laws.

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of the parties, and officers, by curing omissions, defects and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Ohio Revised Code Section 1.20.

1.20 Effect of amendment or repeal on pending actions.

When a statute is repealed or amended, such repeal or amendment does not affect pending actions, prosecutions, or proceedings, civil or criminal. When the repeal or amendment relates to the remedy, it does not affect pending actions, prosecutions, or proceedings, unless so expressed, nor does any such repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.

Ohio Revised Code Section 719.01.

Any municipal corporation may appropriate, enter upon, and hold real estate within its corporate limits:

(A) For opening, widening, straightening, changing the grade of, and extending streets, and all other public places, and for this purpose, the municipal corporation may appropriate the right of way across railway tracks and lands held by railway companies, where such appro-

priation will not unnecessarily interfere with the reasonable use of such property, and for obtaining material for the improvement of streets and other public places;

(B) For parks, park entrances, boulevards, market places, and children's playgrounds;

(C) For public halls and offices, and for all buildings and structures required for the use of any municipal department;

(D) For prisons, workhouses, houses of refuge and correction, and farm schools;

(E) For hospitals, pesthouses, reformatories, crematories, and cemeteries;

(F) For levees, wharves, and landings;

(G) For bridges, aqueducts, viaducts, and approaches thereto.

(H) For libraries, university sites, and grounds therefor;

(I) For constructing, opening, excavating, improving, or extending any canal or watercourse, located in whole or in part within the limits of the municipal corporation or adjacent and contiguous thereto, and which is not owned in whole or in part by the state, or by a company or individual, authorized by law to make such improvements;

(J) For sewers, drains, ditches, public urinals, bathhouses, water closets, and sewage and garbage disposal plants and farms;

(K) For natural and artificial gas, electric lighting, heating, and power plants, and for supplying the product thereof;

(L) For establishing esplanades, boulevards, parkways, park grounds, and public reservations in, around,

and leading to public buildings, and for the purpose of reselling such land with reservations in the deeds as to the future use of such lands, so as to protect public buildings and their environs, and to preserve the view, appearance, light, air, and usefulness of public grounds occupied by public buildings and esplanades and parkways leading thereto;

(M) For providing a water supply for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites, and water works, and for the protection thereof; and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without its limits; and for such purpose and (any) such municipal corporation may appropriate, in the manner provided in sections 163.01 to 163.22, inclusive of the Revised Code, any property or right or interest therein, previously acquired by any private corporation for any purpose by appropriation proceedings or otherwise, and either party to such appropriation proceedings shall have the same right to change of venue as is given in the trial of civil actions;

(N) For the construction or operation of street, interurban, suburban, or other railways or terminals and the necessary tracks, way stations, depots, terminals, workshops, conduits, elevated structures, subways, tunnels, offices, sidetracks, turnouts, machine shops, bridges, and other appurtenances for the transportation of persons, packages, express matter, freight, and other matter, in, from, into, or through the municipal corporation; and for such purpose any municipal corporation may appropriate any property within or without its corporate limits; and any municipal corporation may appropriate any property,

right, or interest therein previously acquired by any private or public utility corporation for any purpose by appropriate proceedings, as well as the right to cross on, over, or under any street, avenue, alley, way, or public place or part thereof of any other municipal corporation, township, or county;

(O) For establishing airports, landing fields, or other air navigation facilities, either within or without the limits of a municipal corporation for aircraft and transportation terminals, with power to impose restrictions on any part thereof and leasing such part thereof as is desired for purposes associated with or incident to such airports, landing fields, or other air navigation facilities and transportation terminals, including the right to appropriate a right of way for highways, electric, steam, and interurban railroads leading from such airport or landing field to the main highways or the main line of such steam, electric, or interurban railroads, as are desired; all of which are hereby declared to be public purposes.

Division (O) of this section does not authorize a municipal corporation to take or disturb property or facilities belonging to any public utility or to a common carrier engaged in interstate commerce, which property or facilities are required for the proper and convenient operation of such utility or carrier, unless provision is made for the restoration, or duplication of such property or facilities elsewhere, at the sole cost of the municipal corporation.

The powers conferred upon municipal corporations by this section shall be exercised for the purposes and in the manner provided in sections 163.01 to 163.22, inclusive, of the Revised Code.

"Airport," "landing field," and "air navigation facility," as defined in section 4561.01 of the Revised Code, apply to division (O) of this section.

NOV 2 1967

JOHN F. DAVIS, CLER

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 139.

SOUTH SHORE PACKING CORPORATION,

Petitioner,

vs.

CITY OF VERMILION,

Respondent.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) [illegible]1-5847

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 139.

SOUTH SHORE PACKING CORPORATION,

Petitioner,

vs.

CITY OF VERMILION,

Respondent.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI.

Petitioner prays that the Court review the order denying the Petitioner's petition for a Writ of Certiorari to the Supreme Court of Ohio entered October 9, 1967, and being petition no. 139 for the October term, 1967.

QUESTIONS PRESENTED.

All the questions presented in the original petition remain to be answered in view of the fact that no opinion was rendered by this Honorable Court. The specific questions which the Petitioner now requires to be answered relates to question no. I, as originally presented, bearing on the right of a municipal corporation to take the property of a private citizen without due process of law; that question no. II relates to the passage of a Resolution and Ordinance by which the City of Vermilion seeks to take the land of the Petitioner for sewage purposes when no sewage purpose was intended, when the Ordinance and Resolution were passed by City Council, and when as a

matter of fact, the City of Vermilion had already found a use for these properties other than for sewage purposes. Question no. III relates to the Constitutions of the United States of America and the State of Ohio forbidding the taking of private property of a citizen without due process, thereby depriving Petitioner of the equal protection of the laws and due process. Question no. IV relates to the proposition that the taking of private property by a municipal corporation is a judicial question as well as a legislative one.

The grounds for this petition for review which are confined to intervening circumstances of substantial or controlling effect, are that it has just come to the attention of the Petitioner that what the Peitioner has been previously saying as to the lack of necessity of Petitioner's property for sewage purposes, are now proven by the exhibits attached to this petition and which were not previously available, which indicate that the Respondent, City of Vermilion, itself, never did intend to use this particular land for a sewage disposal plant but instead, has usage relating to a marina, parking facilities for such marina, or for other purposes relating to a small boat harbor facility; so that the question here presented is whether or not the City of Vermilion may take the land of a private citizen who needs it for his own business, and by a false Ordinance or Resolution, take it for another business.

STATUTES.

Petitioner submits that the statutes involved in this petition are the same as contained in the petition for a Writ of Certiorari but that in addition thereto, Petitioner submits that Section 731.19 of the Revised Code of the State of Ohio so much of which is applicable herein, is necessary for a complete determination of the issues herein, which said portions read as follows:

> 731.19 (4226). "Subject and amendment of bylaws, ordinances, and resolutions. No ordinance, resolution, or bylaw shall contain more than one subject, which shall be clearly expressed in its title. No bylaw or ordinance, or section thereof, shall be revived or amended, unless the new bylaw or ordinance contains the entire bylaw, ordinance, or section revived or amended, and the bylaw, ordinance, or section so amended shall be repealed."

STATEMENT.

Petitioner adopts the statement contained in his original petition for a Writ of Certiorari but in addition thereto, makes the following supplemental statement.

The Petitioner has complained in all of the Courts which heard his case that the Respondent, the City of Vermilion, by Ordinance and Resolution, declared it necessary to take his land for sewage purposes. The evidence submitted by the City proved this not to be the case; that the City appeared to have some additional or ulterior purpose for wanting this particular land. The land in question abuts West River Road, in the City of Vermilion and then runs down a portion of the way to the Vermilion River.

The street portion is approximately 25 feet higher than the land area which the City desires for its sewage

plant and is therefore totally unusable for sewage purposes. It is hoped that the Court will again examine the maps produced by the City of Vermilion and contained in its engineering study designated as the joint exhibit I and A of the parties in the Court of Common Pleas of Erie County, Ohio; that a view of these map studies proves the Petitioner's proposition that the land of the Petitioner was not desired for sewage purposes; that the Petitioner attaches to this petition a photo picture of the proposed completed use of the land area both of the Petitioner's and the other lands going down to the Vermilion River, which picture indicates the real and only reason for the taking of such land, namely, the desire of the City of Vermilion to create a small boat harbor and to further create a marina and parking facilities for the use of the boat owners or operators. In addition thereto, the City Engineer, Mr. Ochse, on behalf of the City of Vermilion at a meeting of Rotary Club in the City of Vermilion on the 25th day of October, 1967, at which meeting he was the principal speaker, brought with him a plat prepared for the City of Vermilion and known as drawing number V-499 and which bears the name of R. E. Warner & Associates, a registered professional engineer, which is the original copy of a site plat, dated November 11, 1965, which is an exact duplicate of the photo picture hereinabove mentioned and totally illustrates that a huge portion of the land being taken by the City of Vermilion for sewage purposes is being diverted for docking and parking for a proposed small boat facility; that in view of the current lawsuit, the marina section has been carefully left out. Petitioner submits that at the meeting above mentioned, Mr. Ochse, who is the City Engineer for the City of Vermilion, made the statements contained in the affidavit which is submitted herewith as an exhibit. Peti-

tioner again refers to the testimony of Mr. Maloney, a registered engineer for the Petitioner:

> "Q. And nowhere in that program—I will ask you—is there anywhere in that program that the Plaintiff's lands are included in the proposed needs of the City of Vermilion, is that correct?
>
> A. I don't know what you mean by proposed needs. If you mean construction facilities on the property, the answer to that is it does not indicate that they need the property for any construction, no."

STATEMENT OF LAW.

Petitioner herein again relies on the statement of the law as contained in his petition for a Writ of Certiorari, but in addition thereto, makes the following supplemental statement of law:

> It is basic law that a municipality does not have the right to acquire real estate for investment purposes or for the purpose of joining with other individuals or entities in the furtherance of some business enterprise.

Ohio Jurisprudence 2nd, Vol. 19, Sec. 21, page 430, states, "Private property can be taken only for a public use."

Ohio Constitution, Article I, Section 19, states that private property shall ever be held inviolate but subservient to the public welfare. These words, which contain a fundamental tenet of our political heritage, express the delicate balance between the rights of our governed and the power of a free government * * * but, on the other hand, the constitutional guaranty of the right of private property would be hollow if all legislation enacted in the name of the public welfare were per se valid. To be truly in the public welfare within the meaning of Article I,

Section 19 of the Constitution of the State of Ohio, and thus superior to private property rights, any municipal legislation must be reasonable, not arbitrary, and must confer upon the public a benefit commensurate with its burden upon private property.

Ohio Jurisprudence 2nd, Vol. 19, Sec. 56, page 469, states the right to take private property which is necessary for public use is just as broad as that necessity and no broader. (See *Covington vs. Magruder,* 59 North Eastern 216.)

The Ohio Courts interpreting Ohio Code numbers 731.17 and 731.19 say strict compliance with these code numbers are mandatory and "carried by full yea vote" in the clerk's record does not comply therewith; the sections above numbered are the current sections of the Ohio Code relating to appropriation of real property by a municipality. The above quotation is taken from the case of *State, ex rel. Groghan vs. Rulon,* and is found in 84 Ohio Abstract on page 464.

In the earlier cases, the power to take by eminent domain was primarily legislative questions. In those cases, the power was held proper except in the absence of fraud, bad faith, or abuse of discretion. Note however, that in the *Vester* case, and in many other cases, the Supreme Court and the State of Ohio now says that these are judicial questions as well as legislative questions. So we may look to the whole scope of the appropriation and not merely the bad faith, etc. phrase. But even at that time, the Courts also held and this is from *Ohio Jurisprudence* 2nd, Vol. 19, Sec. 19, page 429, that but when the property sought to be taken is confessedly unnecessary for the purpose for which it is taken, the Courts may interfere. (See *Cincinnati vs. Haas,* 42 O. S., page 239.)

Ohio Jurisprudence 2nd, Vol. 39, Sec. 299, page 22 states the Code provides as to municipal corporations generally; that no Ordinance, Resolution, or Bylaw shall contain more than one subject which shall be clearly expressed in its title.

Ohio Jurisprudence 2nd, Vol. 39, Sec. 304, page 34, REASONABLENESS. It is a fundamental principle that a municipal Ordinance must be reasonable and may not be arbitrary, discriminatory, or capricious. (See *Cincinnati vs. Correll*, 49 N. E. 2nd 412.)

Ohio Jurisprudence 2nd, Vol. 39, Sec. 307, page 39; in speaking of good faith and motives, states, "* * * But, an Ordinance enacted under the color of authority conferred for a specific purpose, in order to accomplish an ulterior object, has been held to be ineffective insofar as it relates to such ulterior object or purpose." (See *Carpenter vs. Cincinnati Traction Co.*, 106 N. E. 1049.)

In view of the Ohio statutes above mentioned, and the Constitutional provisions herein indicated, and in further view of the fact that the evidence included in this petition clearly indicates other purposes not mentioned in the Ordinance and Resolution; that such Ordinance and Resolution were void insofar as they affected the property of the Petitioner or the additional usages which they had planned for it; that nowhere does there appear any Ordinance or Resolution indicating the City's desire to use the property of the Petitioner for private purposes such as a parking lot or a marina. All the evidence on the other hand points to the proposition that only for these non-municipal needs or desires does the City of Vermilion now seek to take the property of the Petitioner. The Respondent, City of Vermilion, does not say anywhere that they have passed additional Ordinances or Resolutions to take the property of the Petitioner for a parking lot or a ma-

rina, nor would such a Resolution or Ordinance be valid since it is not a taking for a governmental purpose or for the public welfare, but is a private business enterprise which the City of Vermilion appears desirous of engaging in.

CONCLUSION.

For the foregoing reasons, this petition for a review of the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN B. OTERO,
WILLIAM M. BARRETT,
OLIVER TRUE,
Counsel for Petitioner.

Certificate of Counsel.

The undersigned attorney for petitioner hereby certifies that this certificate is made pursuant to Rule 58 of the Rules of the Supreme Court of the United States; that the petition for rehearing is presented to the Court in good faith and not for delay; and that the issues to be resolved are real issues and in a substantial way affect the property of the petitioner herein.

WILLIAM M. BARRETT,
Attorney for Petitioner.

EXHIBIT 1.

Affidavit of Stratton L. Appleman dated October 27, 1967.

Stratton L. Appleman, being first duly sworn, deposes and says that he is the President of the South Shore Packing Corporation.

Affiant further says that he is a member of the Rotary Club in Vermilion, Ohio; that as such member, he attended a meeting of Rotary on the 25th day of October, 1967, at which time the speaker was Mr. Ochse, who is the city engineer for the City of Vermilion and who is also a partner in R. E. Warner and Associates, who are the engineers hired by the City of Vermilion to do the engineering and allied work in connection with the sewage disposal plant and its location, now the subject matter of the within action.

Affiant further says that the South Shore Packing Corporation is the owner of four (4) lots of land which the City of Vermilion seeks to appropriate; that the gist of Mr. Ochse's remark was that the City of Vermilion would add additional parking facilities for its small boat facilities on the property of the South Shore Packing Corporation, if and when it would acquire title thereto.

Affiant further says that in the original Resolution and Ordinance, to acquire such land, the verbiage of the Ordinance and Resolution were as follows:

RESOLUTION No. 65R-1

A resolution declaring the intention of the Council of the City of Vermilion, Ohio, to appropriate for municipal purposes as a part of the site of a proposed new municipal sewage disposal plant the fee simple title to certain real estate situated in the City of Vermilion, Ohio, and declaring an emergency.

Be it resolved by the Council of the City of Vermilion, State of Ohio:

Section 1. That the Council of the City of Vermilion, Ohio, hereby declares its intention to appropriate the fee simple title to the following described real estate:

Situated in the City of Vermilion, State of Ohio and County of Erie and known as being lots numbers 419, 420, 421, and 422 of Block 45 of the old town plat of Vermilion Village and bounded and described as follows:

Beginning at the westerly corner of lot 423 of Block 45, said corner being in the easterly line of Water Street also known as West River Road:

Thence N. 47°50′ E. along the northwesterly line of lot 423 a distance of about 89 feet to the northerly corner thereof:

Thence bearing about N. 32° W. along the northeasterly lines of lots 419 to 422 inclusive a distance of about 240 feet to the southerly line of Ohio Street, also known as being the north corner of lot 419:

Thence S. 47°50′ W. along the south line of Ohio Street a distance of about 113 feet to the easterly line of Water Street:

Thence S. 42°10′ E. along the easterly line of Water Street a distance of about 240 feet to the place of beginning, and containing within said bounds .56 of an acre, be the same more or less, but subject to all legal highways.

Section 2. That the real estate is being appropriated for a municipal purpose, the purpose being as a portion of the site of a new municipal sewage disposal plant, and that the appropriation of the real estate is proper.

Section 3. That this resolution is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety of the city, the emergency being the immediate necessity to ap-

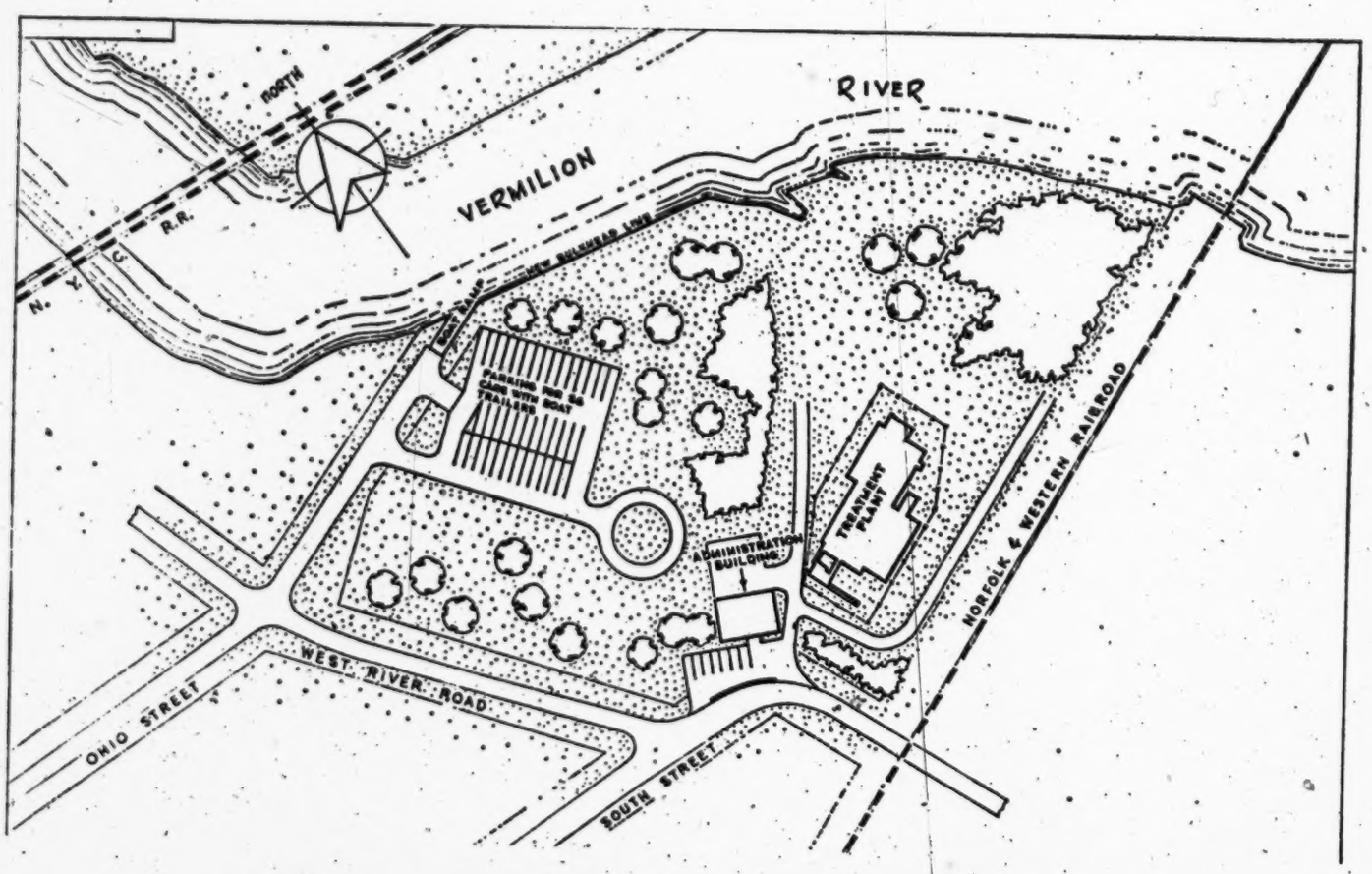
propriate this real estate in order to provide for the erection of a new disposal plant and thereby to protect the health of the inhabitants of the city and this resolution shall go into full force and effect from and immediately after its passage and its approval by the Mayor.

s/ STRATTON L. APPLEMAN

Sworn to and subscribed before me this 27th day of October, 1967.

s/ JOSEPH RADER
Notary Public, State of Ohio,
Lifetime Comm.

(L.S.)



Federal Grant Received

Just after we had gone to press last week, we received word from Congressman Charles A. Mosher's office that the grant of $321,390 from the Federal Water Pollution Control Board to aid in the construction of the city's new sewage disposal had been made.

Checking with Mayor Louis Rauh, Jr., we learned the grant amounted to 30 percent of the cost of building and equipping the plant, which will cost $1,070,320. The grant will be administered by the Ohio Water Pollution Board of Cincinnati.

The total cost of the project is estimated to be $1,365,000 which includes trunk line sewers, conversion of existing disposal plants to pumping stations, and installation of new sewers where none exist today. The balance of the plant cost will be paid by mortgage revenue bonds, and general revenue bonds, except in the cases where new sewers are being installed where none exist today. In this latter case the cost will be paid by assessment.

Construction is expected to begin with ground breaking within 90 days. It has taken four years to bring this project along. First plans had to be drawn up and approved, providing both primary and secondary treatment. These plans had to secure the approval of both the state and federal control agencies. Then the federal grant had to be included in the Federal Budget with the House Appropriations Committee's approval. Mayor Rauh journeyed to Washington to appear with Congressman Mosher before this Committee during the hearings.

The plant will be located on the river, with the treatment plant along the N & W Railroad rightaway and the administration building at the foot of South Street. Shown also on the above drawing is the proposed boat ramp and parking at the foot of Ohio Street. This project is seeking supporting funds from the Ohio Department of Natural Resources. The Ohio Division of Wildlife and Recreation is expected to set aside some of the funds collected from boat licenses and taxes on gasoline used by boats to help finance this project.

This photograph is taken from the *Vermilion Photojournal*, December 15, 1966, Volume 8, No. 15, Page 2.